AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,029

JOSEPH SWARTZ and FREDA SWARTZ,

Appellants,

v.

William P. Rogers

~~HERBERT BROWNELL, JR.~~, Attorney General
Of the United States,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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United States Court of Appeals
For the
District of Columbia Circuit
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STATEMENT OF QUESTIONS PRESENTED

When the United States seeks to deport a resident alien on a retrospective basis under Section 241 (a)(11) of the Immigration and Nationality Act of 1952, using as the deportable incident a narcotics conviction which occurred many years prior to the statute and to the deportee's marriage,

1. Is the statutory provision as applied to the deportee valid under the ex post facto clause of the Constitution in light of the circumstances of this case?

2. Does the marriage of the deportee in 1942 give his wife a contract right or marital status, protected by the due process clause of the Fifth Amendment, which prevents Congress in 1952 from retrospectively and arbitrarily depriving her of that right or status through the retrospective application of Section 241 (a)(11) to her husband?

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UNITED STATES COURT OF APPEALS

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v.

HERBERT BROWNELL, JR., Attorney General of the United States,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

The appellants filed a complaint in the District Court seeking a declaratory judgment under the Declaratory Judgment Act, 28 U.S.C. Sec. 2201, to the effect that the appellant Joseph Swartz is not subject to deportation. The complaint also sought review under the Administrative Procedure Act, 5 U.S.C. Sec. 1009, of the final order of deportation issued with respect to the said appellant under the provisions of 8 U.S.C. Sec. 1251(a)(11). Finally, the complaint sought to restrain the appellee from proceeding with the deportation. The District Court, after hearing oral argument, entered a final order

denying appellants' motion for summary judgment and granting appellee's motion for judgment on the pleadings. From that order appellants now appeal to this Court and invoke its jurisdiction under 28 U.S.C. Sec. 1291.

STATEMENT OF THE CASE

The facts in this case are not in dispute. On or about August 3, 1908, the appellant Joseph Swartz, then about seven years of age and a native of Rumania, was lawfully admitted to the United States for permanent residence. (J. A. 1) He has retained the status of a permanent resident since that time, never having become a naturalized American citizen (J. A. 1, 3, 7).

On July 16, 1930, the appellant Joseph Swartz was convicted in the District Court of the United States for the District of Minnesota on his plea of guilty to the first count of a two-count indictment charging that on June 30, 1927, he did unlawfully sell, dispense and give away morphine in violation of the federal narcotics laws. (J. A. 3, 7) A sentence of imprisonment was duly imposed and appellant served that sentence. At the time of appellant's commission of this offense and his conviction therefor, neither the commission nor the conviction constituted a basis for deporting him from the United States.

On January 15, 1942, appellant Joseph Swartz was married to appellant Freda Swartz (J. A. 2, 3, 7, 8). Appellant Freda Swartz is a naturalized citizen of the United States and has resided continuously in this country since 1925. (J. A. 8) She has never visited Rumania, has no knowledge of the Rumanian language and has no criminal record of any kind (J. A. 8). She is a housewife. She has no outside employment and depends solely and entirely upon her husband, the appellant Joseph Swartz, for her support and livelihood (J. A. 8). They reside in Minneapolis, Minnesota.

As a result of their marriage, the appellants have one living issue, a son Michael Charles Swartz. This son was born in Minneapolis, Minnesota, on May 13, 1946, and hence is a natural born American citizen (J. A. 2, 3, 7, 8). He has at all times resided in Minneapolis and continues to attend school there (J.A. 8, 9). He has never travelled outside the United States. He can read and write the English language, but has no knowledge of any foreign language (J. A. 9). As a minor, he continues to be fully and entirely dependent upon his father, the appellant Joseph Swartz, for his support, livelihood and guidance (J. A. 9).

In 1952, Congress enacted a revised Immigration and Nationality Act, Section 241 (a)(11) [8 U.S.C. Sec. 1251(a)(11)] of which provides that any alien in the United States, shall, upon the order of the Attorney General, be deported who

> "is, or hereafter at any time after entry has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs . . . ."

In 1953, some 26 years after the commission of his narcotics offense and some 11 years after his marriage, appellant Joseph Swartz became the subject of deportation proceedings by the Immigration Service. In February, 1955, a final order was entered ordering him deported under the provisions of the aforementioned Section 241 (a)(11) on the sole ground that he had been convicted in 1930 of a violation of the narcotics laws (J. A. 1, 2, 3, 7).

The appellants then instituted the instant proceeding in the District Court to review this final order of deportation by way of a declaratory judgment and a request for injunctive relief. It was alleged (J. A. 4) that Section 241 (a)(11) did not affect "the status of a person who was non-deportable prior to the effective date of said provision and who has not committed any act since that date which would

place him under the terms of said provision." It was further alleged (J. A. 4, 5) that "if it is the conclusion of the Court that 8 U. S. C. Sec. 1251 (a)(11), does purport to render a person deportable, who, prior to the enactment thereof, had a non-deportable status and who has not committed any act since the enactment of said legislation to place him under the terms of said provision, then such provision is in conflict with the Constitution of the United States to the extent to which it has retroactive effect in that it is ex post facto and in that it deprives plaintiff, Freda Swartz, of liberty and property without due process of law."

After filing an answer (J. A. 2, 3), the appellee filed a motion for judgment on the pleadings (J. A. 4). The appellants thereafter filed a motion for summary judgment. (J. A. 5) The District Court ordered (J. A. 9) action withheld on these two motions pending the decision of the Supreme Court in Mulcahey v. Catalanotte, 353 U.S. 692. Following the Supreme Court's decision in that case on June 3, 1957, the District Court heard oral argument on the two motions. On July 15, 1957, the court entered a final order granting the appellee's motion for judgment on the pleadings and denying appellants' motion for summary judgment. (J. A. 9, 10) Appellants filed a notice of appeal to this Court (J. A. 10). This Court then granted a stay of the deportation order pending the final disposition of this appeal.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

> Article I, Sec. 9, Cl. 3: "No Bill of Attainer or ex post facto Law shall be passed."
>
> * * * *
>
> Fifth Amendment: "No person shall . . . be deprived of life, liberty, or property, without due process of law, . . ."
>
> * * * *

Immigration and Nationality Act of 1952:

Section 241 [8 U.S.C. 1251]:

"(a) Any alien in the United States (including alien crewman) shall, upon the order of the Attorney General, be deported who

* * *

"(11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs. . ."

* * *

Section 241 (d)[8 U.S.C. 1251(d)]:

"Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (c), occurred prior to the date of enactment of this Act."

* * *

Section 405(a) [8 U.S.C. 1101, Note]:

"Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect . . . any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, 1/ conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect."

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1 This word is a typographical error and should be read as "statuses." See Lehmann v. Carson, 353 U.S. 685, 688, footnote 3.

STATEMENT OF POINTS

1. The court below erred in not reconsidering the impact of the ex post facto clause of the Constitution on a retroactive application of Section 241 (a)(11) of the Immigration and Nationality Act of 1952.

2. The court below erred in not giving recognition to the deportee's constitutional right under the ex post facto clause to be free from a retroactive application of a deportation law.

3. The court below erred in not giving recognition to the constitutional due process right under the Fifth Amendment adhering to the deportee's wife, a right to maintain and preserve her vested marital status free from a destruction of that status through a retroactive application to her husband of a deportation law.

SUMMARY OF ARGUMENT

While the Supreme Court in Mulcahey v. Catalanotte, 353 U.S. 692, held that Congress may apply Section 241 (a)(11) of the Immigration and Nationality Act of 1952 in a retrospective manner, the Court did so with great reluctance. It felt that as an original proposition such an application would violate the ex post facto clause of the Constitution but felt it was foreclosed from reaching that result as a matter of stare decisis.

However, appellant Joseph Swartz renews his contention that Section 241 (a)(11), as applied to him on a retrospective basis, does violate the ex post facto clause. A reconsideration of the dicta and precedents said to preclude that conclusion is appropriate under the circumstances of this case, where new and different considerations are also present. Those considerations relate to the claim of his wife, the appellant Freda Swartz, that her constitutional due process right to the maintenance of her marital status is protected against the retrospective destruction of that status under the guise of a retrospective deportation law.

In presenting this new claim, appellant Freda Swartz maintains that the due process clause of the Fifth Amendment gave her a right, which accrued on her marriage in 1942, to establish a home, create a family, have the society and devotion of her husband, and possess the financial and emotional security of a mate. This right, which has not been altered in any way by the action of either the husband or the wife, cannot be arbitrarily or unfairly interfered with by either the government or private individuals. And to impose a retrospective deportation law on her husband, reaching back to a point prior to her marriage and establishing a deportable incident out of a conviction that was not deportable when it occurred, is to destroy the marital status in an unconstitutional and unfair manner. Application of such a law is so arbitrary and without relation to any legitimate purpose of government as to fall under the ban of the Fifth Amendment's due process clause.

The power of Congress to provide for deportation is not unlimited. It is bounded by the provisions of the Bill of Rights and other sections of the Constitution. Here it is in conflict with the Fifth Amendment and hence must be appropriately curtailed. This may be done without unduly infringing upon congressional power over deportation, while at the same time giving due recognition to the historic principles of the Fifth Amendment.

ARGUMENT

1. Appellant Joseph Swartz renews and preserves his contention that, under the circumstances, he is constitutionally protected against deportation on an ex post facto basis.

In Mulcahey v. Catalanotte, 353 U.S. 692, the Supreme Court held that Section 241 (a)(11) of the Immigration and Nationality Act of 1952 -- the provision under which the appellant Joseph Swartz has been ordered deported -- permits the deportation of an alien convicted of a narcotics offense many years prior to the enactment of the 1952 statute.

The savings clause of the statute, Section 405(a), was held to be inapplicable in light of the express language of Section 241(d) making Section 241 (a)(11) apply even though the relevant facts "occurred prior to the enactment of this Act." And the Court expressly stated that Congress had the power to legislate in this retrospective fashion. See also the companion decision in Lehmann v. Carson, 353 U.S. 685.

By reason of the Catalanotte and Carson decisions, appellant Joseph Swartz has abandoned his original claim (par. 9 of complaint, J. A. 2, and par. 9A of complaint, J. A. 4) that Section 241 (a)(11) does not purport to affect his status or render him deportable. Not even the two dissenting Justices in the Catalanotte and Carson cases (see 353 U.S. at 690-691) disputed the applicability of Section 241 (a)(11) to a situation like the instant one as a matter of statutory construction.

But the appellant Joseph Swartz does renew and preserve his original claim (par. 10 of complaint, J. A. 4-5) that Section 241 (a)(11), as thus interpreted and as applied to him, is in conflict with the Constitution of the United States in that its retroactive application violates the ex post facto clause. He does this despite the fact that the Supreme Court in the Catalanotte and Carson cases stated that Congress in this instance was legislating retrospectively, "as it may do."

The conclusion of the Supreme Court that Congress may legislate retrospectively in this connection was reached with the greatest of reluctance, based upon the principle of stare decisis. It was reached with two of the Justices calling for a reconsideration of the application of the ex post facto clause "with a view to applying it in a way that more effectively protects individuals from new or additional burdens, penalties, or punishments retrospectively imposed by Congress." 353 U.S. at 691. And the conclusion was reached in the context of a situation unlike that present here, where the deportee's wife is asserting constitutional objections to the threatened deportation.

That the Supreme Court sustained the retroactive application of Section 241 (a)(11) with extreme reluctance is obvious from the cases cited by the Court.[2] Those cases purport to stand for the proposition that the prohibition of the ex post facto clause constitutes no bar to the retroactive application of a deportation law. But an examination of those cases reveals that such a proposition has been built upon dictum and misinterpretation and that the Court has continued to follow it without relish by reference to the doctrine of stare decisis. Indeed, the actual decision that a deportation law may be applied on an ex post facto basis is of quite recent origin, making it appropriate to reexamine the conclusion in light of the additional considerations presented by this case.

It had long been established that the ex post facto clause applies only in criminal cases. Carpenter v. Pennsylvania, 17 How. 456, 463; Johannessen v. United States, 225 U.S. 227, 242; Bugajewitz v. Adams, 228 U.S. 585, 591; Mahler v. Eby, 264 U.S. 32, 39. And it had also been repeated many times that deportation, despite all its possible cruel consequences, is to be classified as a civil rather than a criminal procedure. Fong Yue Ting v. United States, 149 U.S. 698, 730; Bugajewitz v. Adams, supra, 591; United States ex rel. Bilokumsky v. Tod, 263 U.S. 149, 154. On various occasions the Court in dicta expressed the view that the ex post facto clause thus had no application to deportation proceedings and that a deportation law could validly be applied retrospectively. Bugajewitz v. Adams, supra, 591; Mahler v. Eby, supra, 39; Harisiades v. Shaughnessy, 342 U.S. 580, 594-595. But in none of the last cited cases was the Court actually confronted with a retrospective application of a deportation law; in each of them the law was found to have been applied prospectively.

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2 See cases cited in footnote 4 of the Carson case, 353 U.S. at 690, and footnote 5 of the Catalanotte case, 353 U.S. at 694.

It was not until 1955, in Marcello v. Bonds, 349 U.S. 302, that the Supreme Court was faced with a truly retrospective use of the deportation power. By this time, however, the dicta relating to the constitutional validity of such use had been uncritically repeated so many times that the Court could "perceive no special reasons, however, for overturning our precedents on this matter." 349 U.S. at 314. The summary reaffirmation of this result in the Catalanotte and Carson cases can stand on no firmer basis in past decisions.

But the lack of enthusiasm for this result, thought to be forced upon the Court by the doctrine of stare decisis, has been plainly evident. In Harisiades v. Shaughnessy, 342 U.S. 580, 594, the Court stated:

> "It has always been considered that that which it [the ex post facto clause] forbids is penal legislation which imposes or increases criminal punishment for conduct lawful previous to its enactment. Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure. Both of these doctrines as original proposals might be debatable, but both have been considered closed for many years and a body of statute and decisional law has been built upon them." [Emphasis added]

And in Galvan v. Press, 347 U.S. 522, 530-531, the Court said:

> ". . . much could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens. And since the intrinsic consequences of deportation are so close to punishment for crime, it might fairly be said also that the ex post facto clause, even though applicable only to punitive legislation, should be applied to deportation."
>
> "But the slate is not clean." [Emphasis added.]

And so, under circumstances where the validity of retroactive deportation proceedings has been sustained so recently and so reluctantly, it is appropriate and necessary to reconsider the application of

the ex post facto clause to deportations where new and different considerations are present. Reluctant conclusions ought to be narrowly construed if not reversed. And in this case the facts and contentions are sufficiently different to distinguish this from the preceding cases. The distinguishing facts and contentions relate to the constitutional rights of the wife, the appellant Freda Swartz, which have been invaded by the application of Section 241(a)(11) of the 1952 Act, as discussed hereinafter.

The violations of the wife's constitutional rights which are implicit in Section 241 (a)(11) serve to highlight the unfairness of that provision as to the husband, the appellant Joseph Swartz. In other words, the Supreme Court has never been confronted with a situation where a deportee's wife has claimed that her constitutional rights have been violated by the retrospective operation of the deportation order. Recognition of her rights, in light of her obvious and close relationship with the deportee, would be an appropriate reason for reexamining the deportee's rights and reconsidering the whole problem of the application of the ex post facto clause to deportation proceedings.

Once such a reexamination is made, appellant Joseph Swartz asserts that the unfairness of the retrospective application of Section 241(a)(11) to him is patent. That unfairness is the very evil which the ex post facto clause was designed to prevent. It is the evil of reaching back many years and adding deportation as one of the legal consequences of an offense for which he paid the full price society then exacted for his misconduct. It is the evil of thus retrospectively imposing additional punishment in the form of deportation, a punishment aptly described as being "a penalty" as severe as the loss of livelihood, Bridges v. Wixon, 326 U.S. 135, 154, and as possibly resulting "in loss of both property and life; or of all that makes life worth living." Ng Fung Ho v. White, 259 U.S. 276, 284.

That the ex post facto clause may legitimately be applied to a civil proceeding like deportation that is a mere mask for what amounts to a criminal proceeding, to which the Court has likened deportation, has long been established. Fletcher v. Peck, 6 Cranch 87, 138, 139; Cummings v. Missouri, 4 Wall. 277; Ex parte Garland, 4 Wall. 333; and see United States v. Lovett, 328 U.S. 303, 315, 316. The only obstacle to date in the path of applying this principle to deportation is the supposed one of stare decisis. But since the additional and new constitutional considerations in this case open up the deportation problem to a wider and more penetrating analysis than has ever been attempted by the Supreme Court, the doctrine of stare decisis no longer is controlling. It is to those considerations that we now turn. As to them the slate is clean.

2. Appellant Freda Swartz contends that the retrospective application of Section 241(a)(11) to her husband, based upon his conviction for a crime committed before their marriage, violates her rights under the Fifth Amendment.

The appellant Freda Swartz is an American citizen, as she was in 1942 when she married the appellant Joseph Swartz. At the time of this marriage, twelve years had elapsed since the completion of the prison sentence imposed on Joseph Swartz as a result of his conviction for a narcotics offense. Freda Swartz married him with the knowledge that he had paid the full penalty which the law in 1930 had exacted for such a crime. She assumed, as she had a right to, that no further penalties would be imposed after the marriage.

Following this marriage, the appellants had one child, an American citizen by birth. Both this son and appellant Freda Swartz have become financially dependent upon Joseph Swartz. They know nothing of the Rumanian language or the country of Rumania, to which Joseph Swartz has been ordered deported. To deport him to Rumania, fifty years after he left that country, is to tear apart this family group, to

deprive Freda Swartz of all the benefits of her marriage, and to subject Joseph Swartz to a fate of possible persecution and death.

Out of these uncontested facts emerges a gross violation of a substantial constitutional right adhering to the appellant Freda Swartz. In 1942 she entered into a contract of marriage with an alien who was lawfully in this country and who could not then be deported for the prior narcotics conviction in 1930. Such a marriage was "a thing of common right" to be encouraged by the Government, Meister v. Moore, 96 U.S. 76, 81, and "is regarded by a court of justice as a civil contract." Jewell's Lessee v. Jewell, 42 U.S. 219, 233. Indeed, it was more than an ordinary civil contract. It was the act of becoming a part of "an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress." Maynard v. Hill, 125 U.S. 190, 211. See also Tipping v. Tipping, 65 App. D.C. 222, 224, 82 F. 2d 828, 830; Adams v. Palmer, 51 Me. 481, 483; Ditson v. Ditson, 4 R.I. 101.[3]

In establishing her marital status, Freda Swartz was vested with certain rights and privileges which could not be arbitrarily taken from her. To her accrued the right to establish a home, to create a family, to have the society and devotion of a husband, and to possess the financial and emotional security of a mate. In Daily v. Parker, 152 F. 2d 174, 175 (C. A. 7), it was said:

> "The father, the mother, and the children ordinarily constitute the family. Each is entitled to the society and the companionship of the others. Within the limits of the others' abilities, each is entitled to the financial aid and support of the others, . . . the children are entitled to shelter, food, clothing, and schooling and to the social, the moral support, guidance, and protection of their father. . ."

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[3] "American cases have declared marriage to be 'an institution', a 'domestic relation', a 'contract', a 'civil contract', and a 'status'. All agree that a religious ceremony is unnecessary. Marriage clearly differs from an ordinary contract, in that (1) it cannot be rescinded or its fundamental terms changed by agreement; (2) it results in a status; (3) it merges the legal identity of the parties at common law; (4) it is not a contract within the Fourteenth Amendment, United States Constitution, forbidding legislation impairing the obligation of contract; (5) the tests of capacity differ from those applied to ordinary contracts." -- 1 Vernier, American Family Laws (1931), Sec. 14, p. 51.

And Dean Roscoe Pound, in an article entitled Individual Interests in the Domestic Relations, 14 Mich. L. Rev. 177, 193, 196 (1916), has written that a wife may assert four claims growing out of the marital relation against the world at large, one of which is:

> "[A]n interest in the society of her husband, quite apart from any economic advantage, as something so related to her spiritual existence as to be in effect an interest of personality. . . . There is not only the individual interest of the other party to the relation, . . . but in modern social conditions there are the social interests in the family as a social institution, in the protection of dependent persons, and in the rearing and training of sound and well-bred citizens for the future."

Long ago the Supreme Court established that Freda Swartz' right to marry, to establish a home and to have the companionship and support of her husband was infused with a constitutional sanction. In Meyer v. Nebraska, 262 U.S. 390, 399-400, the Court held that a person such as Freda Swartz has the liberty or right under the due process clause of the Fourteenth Amendment -- and necessarily under the Fifth Amendment --

> ". . . to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. [Cases cited.] The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to act." [Emphasis added.]

Such a constitutional and legal right, of course, is protected against arbitrary and unwarranted interference by governmental or private action. As stated by the Supreme Court of Minnesota in Miller v. Monsen, 228 Minn. 400, 402, 37 N.W. 2d 543, 545:

> "Among the rights of the members of a family as against the world are those of having the family maintained intact without interference by outsiders. . . . This right is protected also under the Constitution of the United States against outside interference even by government." [Emphasis added.]

Appropriate protection as against private intruders has long been recognized.[4] Thus this Court has declared that those entering into a marital status thereby acquire "a legal right to the affection and consortium of the other," and that the "deprivation of the same, intentionally caused by a third party, is legally actionable." Fleming v. Fisk, 66 App. D.C. 350, 87 F.2d 747. And see Dodge v. Rush, 28 App. D.C. 149; Richards v. Lorleberg, 65 App. D.C. 57, 79 F.2d 413. "Each is entitled to the comfort, companionship, and affection of the other. The rights of the one and the obligations of the other spring from the marriage contract, are mutual in character, and attach to the husband as husband and to the wife as wife. Any interference with these rights, whether of the husband or of the wife, is a violation, not only of natural right, but also of a legal right arising out of the marriage relation." Bennett v. Bennett, 116 N.Y. 584, 590, 23 N.E. 17.

Similar protection against unjust interference with the marital status by state or federal action is afforded by the due process clauses of the Fourteenth and Fifth Amendments of the Constitution. That protection is a reflection of the fact that "there cannot exist under the American flag any governmental authority untrammeled by the requirements of due process of law as guaranteed by the Constitution of the United States." Mora v. Mejias, 206 F.2d 377, 382 (C.A. 1).

Such, then, is the general nature of the constitutional right which Freda Swartz here asserts, a right to the continued companionship of her husband and all that such companionship connotes free from interference "by legislative action which is arbitrary or without reasonable

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[4] "Once the marriage relation is entered into the courts protect it from meddling by others, by means of contracts, conditions, or otherwise." 6 Williston on Contracts (Rev. ed. 1938), Sec. 1741, footnote 13, p. 4928.

relation to some purpose within the competence of the state to act." Meyer v. Nebraska, 262 U.S. 390, 400. That right is an implicit part of the liberty explicitly protected by the Fifth Amendment. In the instant situation, of course, the United States claims the power to interfere with and override that constitutional right through the exercise of its authority to deport aliens residing within this country. The clash between the claimed constitutional right and the claimed governmental authority must therefore be resolved.

It can no longer be questioned that the power of Congress to deport aliens is bounded by the various dictates of the Constitution. However plenary and absolute the deportation power may be thought to be, it is plenary and absolute only within the confines of the power itself. Every plenary power of Congress, whether it be the interstate commerce power or the deportation power or some other power, is necessarily limited by the provisions of the Bill of Rights and other portions of the Constitution. See North American Co. v. S. E. C., 327 U.S. 686, 704-705; American Power & Light Co. v. S. E. C., 329 U.S. 90, 100.

Any other conclusion would produce the intolerable result of permitting Congress to order the deportation of aliens for the most arbitrary of reasons - such as the color of their hair - or because of their use of the elementary rights of free speech. But it has long been established that aliens resident in this country are entitled to the privileges and rights carved out in the Bill of Rights. An alien has the right of free speech guaranteed by the First Amendment. Bridges v. California, 314 U.S. 252. He is entitled to the protection of the Fifth and Sixth Amendments in criminal trials. Wong Wing v. United States, 163 U.S. 228. And he may not be deprived of life, liberty or property without due process of law or be denied the equal protection of the laws. Yick Wo. v. Hopkins, 118 U.S. 356; Truax v. Raich, 239 U.S. 33; Takahashi v. Fish & Game Commission, 334 U.S. 410.

More particularly, the congressional authority over deportation has been held subject to the constitutional requirement of procedural due process, a requirement that "derives from the same source as Congress' power to legislate and where applicable, permeates every valid enactment of that body." Wong Yang Sung v. McGrath, 339 U.S. 33, 49. See also Japanese Immigrant Case (Yamataya v. Fisher) 189 U.S. 86, 101. As the Supreme Court said in Ng Fung Ho v. White, 259 U.S. 276, 284-285, against the danger that deportation without judicial proceedings might unfairly result in the loss of both property and life, "the 5th Amendment affords protection in its guaranty of due process of law." And in Harisiades v. Shaughnessy, 342 U.S. 580, the Court tested the deportation power against certain rights claimed under the free speech provision of the First Amendment and the due process clause of the Fifth Amendment, thereby recognizing the pertinency of those constitutional provisions in marking out the boundaries of the deportation power.

Thus the deportation power of Congress must be measured against appellant Freda Swartz' constitutional due process right to the continuance of her marital status as vested in 1942. It is a conflict between an implied power of Congress and an express right of the individual. The power of Congress to exclude, admit or deport aliens stems from sovereignty itself and from the authority "to establish an uniform Rule of Naturalization." Art. I, Sec. 8, Cl. 4, of Constitution. The deportation power is necessarily an implied one, as contrasted with the express recognition in the Fifth Amendment of the individual's right to life and liberty.

The scope of congressional power to determine what aliens may be admitted or shall be deported from the United States is unquestionably great. The determination of such questions is primarily a political one, over which the courts cannot invoke their reviewing power.

Harisiades v. Shaughnessy, 342 U.S. 580. But this legislative power, like all powers of government, is limited ultimately by constitutional provisions. And in this case it is appellant Freda Swartz' contention that the deportation power unfairly interferes with her constitutional right to the liberty of acquiring and maintaining a marital status.

Obviously, of course, a woman who marries an alien does not thereby shield him forever from the possibility of deportation. On marriage, she assumes the risk that her alien husband may thereafter commit some offense that will subject him to deportation or to some other form of punishment that will effectively destroy the marital relationship. She has no constitutional right to the maintenance of her status in the face of the enforcement against her husband of valid criminal laws or of prospective deportation laws.

All that the appellant Freda Swartz contends here is that she is constitutionally protected in her marital status against the retrospective application of a deportation law against her husband. She is protected against a law which reaches back to an incident before her marriage and for the first time gives to that incident a legal consequence which shatters the marriage relationship. On her marriage in 1942, Freda Swartz' status was vested in light of the then existing law. She was entitled to assume that her husband, having been convicted of a narcotics offense in 1930 and having fully served his penalty, would not thereafter be punished for that offense in such a manner as to destroy the marriage. The great interest of society in maintaining the sanctity and existence of the Swartz family arose in 1942, giving to each member thereof a status which cannot be lightly destroyed.

The vice in the effort of the United States to destroy the marital status of Freda Swartz is its retrospective nature. It is the very same vice which infects the effort to deport appellant Joseph Swartz and which would condemn that effort under the ex post facto clause once a court reconsiders the unhappy status of the deportation power under that

clause. The grave doubts expressed by the Supreme Court as to the validity of retrospective deportation of an alien, considered as an original proposition, apply with even greater force to a retroactive upsetting of a marital status under the guise of a deportation law.

Here there is a complete absence of any rational connection between the retroactive imposition of the penalties of deportation and destruction of marital status and the present desirability of retaining both the alien and the marital status. Section 241 (a)(11) of the Immigration and Nationality Act of 1952 merely adds a new punishment for a past offense, a punishment that not only results in the deportation of Joseph Swartz but in the destruction of Freda Swartz' marital status. This is the very type of injustice and unfairness that the due process clause of the Fifth Amendment was designed to prevent. It is the type of legislation which, in the terms of the Supreme Court in Meyer v. Nebraska, 262 U.S. 390, 400, is so "arbitrary or without reasonable relation to some purpose within the competency of the state to effect" as to be subject to constitutional condemnation under the due process clause.

That Congress did not intend such a harsh result as respects Freda Swartz is evident from the provision of the savings clause, Section 405(a) of the Act, to the effect that nothing in the Act shall be construed to affect "any status" existing at the time the Act took effect in 1952. Clearly she had a marital status in existence in 1952, a status which entitled her to the continued companionship and support of her husband in this country free from any retroactive upsetting of that status. To give effect both to this statutory provision and to the constitutional command of due process requires voiding the order of deportation directed to Joseph Swartz.

CONCLUSION

To grant relief in this case is not to prevent the United States from deporting all married aliens or to discriminate against bachelor aliens. It is merely to recognize the unfairness and illegality that inhere in any attempt to impose the deportation law on a retrospective basis. That unfairness expresses itself not only as to the alien himself but as to his wife and as to the continued existence of her marital status. To give expression to the constitutional rights of both the husband and the wife which are affected by that unfairness is to uphold the constitutional standards to which this nation is devoted.

To that end, the judgment below should be reversed with directions to grant summary judgment in favor of the appellants.

Respectfully submitted,

EUGENE GRESSMAN
MAX M. KAMPELMAN
RICHARD SCHIFTER
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Washington 6, D. C.
Attorneys for Appellants

Of Counsel:

Robbie and Hoffman
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Minneapolis 3, Minnesota

September 18, 1957.

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JOINT APPENDIX

[Filed June 13, 1956]

JOSEPH SWARTZ AND FREDA SWARTZ, 2716 Drew Avenue So., Minneapolis, Minnesota, Plaintiffs, vs. HERBERT BROWNELL, JR., Attorney General of the United States Defendant.	)	No. CA 2296-56 Amended Complaint For Declaratory Judgment and Injunctive Relief

The plaintiffs respectfully allege:

1. That this is an action for declaratory judgment under the Declaratory Judgment Act, 28 U.S.C. 2201, and for review under 5 U.S.C. 1009, and for injunctive relief.

2. That plaintiff, Joseph Swartz, is stateless and is a native of Rumania.

3. That plaintiff, Joseph Swartz, is married to plaintiff, Freda Swartz, a citizen of the United States, and that plaintiffs are the parents of Michael Swartz, age 10, a citizen of the United States.

4. That the defendant, Herbert Brownell, Jr., is the Attorney General of the United States and is charged with the statutory duty to determine after appropriate hearings whether aliens are to be deported from the United States, and supervises the administration of the Immigration and Naturalization Service and the Board of Immigration Appeals.

5. That on or about August 3, 1908, when he was seven years old, plaintiff, Joseph Swartz, was lawfully admitted to the United States for permanent residence and has remained a permanent resident since that time.

6. That a final order is now pending ordering plaintiff, Joseph Swartz, deported under the provisions of 8 U.S.C. Sec. 1251 (a)(11).

7. That the sole offense for which plaintiff, Joseph Swartz, is to be deported was committed on June 30, 1927 and that he was convicted for said offense on July 16, 1930.

8. That plaintiff, Freda Swartz, was married to plaintiff, Joseph Swartz, on January 15, 1942, and subsequently bore him a child, Michael Swartz, born on May 13, 1946.

9. That neither at the time of plaintiff, Freda Swartz's marriage to plaintiff, Joseph Swartz, nor at any time prior thereto nor at any time subsequent thereto but prior to December 24, 1952, was there a statute in effect purporting to render plaintiff, Joseph Swartz, deportable.

10. That the statutory provision on which the order of deportation is based, 8 U.S.C. Sec. 1251 (a)(11), is in conflict with the Constitution of the United States to the extent to which it has retroactive effect in that it is ex post facto and in that it deprives plaintiff, Freda Swartz, of liberty and property without due process of law.

Wherefore, plaintiffs request a judgment

a. declaring that plaintiff, Joseph Swartz, is not subject to deportation;

b. restraining defendant from proceeding with the deportation of plaintiff, Joseph Swartz;

c. for such other and further relief as may be appropriate.

/s/ Max M. Kampelman
Attorney for Plaintiffs
1700 K Street, N.W.
Washington 6, D. C.

Of Counsel:

Robbie and McKeon
827 Plymouth Building
Minneapolis 3, Minnesota

[Filed July 25, 1956]

ANSWER TO AMENDED COMPLAINT FOR DECLARATORY JUDGMENT

First Defense

The complaint fails to state a claim upon which relief may be granted.

Second Defense

Answering the enumerated paragraphs of the amended complaint, defendant avers as follows:

1. Defendant is not required to answer the jurisdictional allegations of paragraph 1.

2. Denied. Defendant avers that Joseph Swartz is a native and citizen of Rumania.

3. and 4. Admitted.

5. Admitted. Defendant further avers that Joseph Swartz has lived in the United States ever since his admission for permanent residence at Sault Ste. Marie, Michigan, on August 3, 1908; that he was absent from the United States on a visit of about two days to Canada and that he re-entered the United States as a returning resident at Noyes, Minnesota during 1920 or 1921.

6. Admitted.

7. Admitted. Defendant further avers that the warrant charge upon which Joseph Swartz' deportation is ordered is based on a conviction in the District Court of the United States in and for the District of Minnesota on July 16, 1930 on his plea of guilty to the first count of a two-count indictment charging that on June 30, 1927 he did unlawfully sell, dispense, and give away a certain derivative of opium, to wit: morphine.

8. Admitted.

9. Defendant avers that the allegations of paragraph 9 are not material and that he is not required to answer. Defendant avers that Joseph Swartz is subject to deportation, however, under Section 241(a)(11) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1251(a)(11).

10. Denied.

WHEREFORE, having fully answered defendant demands judgment and costs of this action.

/s/ Frank H. Strickler
Assistant United States Attorney

/s/ Oliver Gasch
United States Attorney

/s/ Kitty Blair Frank
Assistant United States Attorney

/s/ Edward P. Troxell, Principal
Assistant United States Attorney

[Certificate of Service]

[Filed July 25, 1956]

MOTION FOR JUDGMENT ON THE PLEADINGS

Comes now the defendant by his attorney the United States Attorney, and moves this Court for judgment on the pleadings inasmuch as it appears from the face of those pleadings that no claim exists upon which relief can be granted to plaintiffs.

/s/ Oliver Gasch
United States Attorney

/s/ Edward P. Troxell
Assistant United States Attorney

/s/ Frank H. Strickler
Assistant United States Attorney

/s/ Kitty Blair Frank
Assistant United States Attorney

[Certificate of Service]

[Filed November 5, 1956]

MOTION TO AMEND COMPLAINT

The plaintiffs move the Court pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, for leave to amend their Complaint for Declaratory Judgment and Injunctive Relief, filed in this case, by inserting paragraph 9A between paragraphs 9 and 10 of the Complaint, and to rephrase paragraph 10 to conform to amended paragraph 9A, as follows:

9A. That there is no statute presently in effect rendering plaintiff, Joseph Swartz, deportable, since the statutory provision on which the order of deportation is based, 8 U.S.C. Sec. 1251(a)(11), does not affect the status of a person who was non-deportable prior to the effective date of said provision and who has not committed any act since that date which would place him under the terms of said provision;

10. That if it is the conclusion of the Court that 8 U.S.C. sec. 1251(a)(11), does purport to render a person deportable, who, prior to the enactment thereof, had a non-deportable status and who has not committed any act since the enactment of said legislation to place him under the terms of said provision, then such provision is in conflict with the

Constitution of the United States to the extent to which it has retroactive effect in that it is ex post facto and in that it deprives plaintiff, Freda Swartz, of liberty and property without due process of law.

These amendments will more clearly define plaintiff, Joseph Swartz' non-deportable status. They are necessary to present the real issues of the case and are in the interest of Justice. Moore v. Illinois Central R.R. Co. (S.D. Misc. 1938), 24 F. Supp. 731; Earhart v. Valerius (W.D. Mo. 1938), 25 F. Supp. 754.

/s/ Max M. Kampelman
Attorney for plaintiffs
1700 K Street, N.W.
Washington 6, D. C.

[Certificate of Service]

[Filed November 9, 1956]

MOTION FOR SUMMARY JUDGMENT

The plaintiffs move the Court as follows:

1. That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in plaintiffs' favor for the relief demanded in the complaint on the ground that there is no genuine issue as to any material fact and the plaintiffs are entitled to a judgment as a matter of law.

This motion is based upon:

(a) Affidavit of plaintiff Freda Swartz dated October 1, 1956, relating to her status as a United States citizen;

(b) A memorandum of law accompanying this motion.

/s/ Max M. Kampelman
Attorney for Plaintiffs

[Certificate of Service]

[Filed November 15, 1956]

ORDER

For good cause, it is this 15th day of November, 1956,

ORDERED that plaintiff's motion to amend the complaint be granted and that the complaint be and the same is hereby amended to include paragraphs 9(a) and 10 as set forth in plaintiff's motion to amend the complaint and it is

FURTHER ORDERED that defendant's motion for judgment on the pleadings be considered as applicable to the Amended Complaint and the answer thereto, and it is

FURTHER ORDERED that argument on defendant's motion for judgment on the pleadings remain as set on the motions calendar for November 20, 1956.

/s/ Burnita Shelton Matthews
JUDGE

CONSENT:

/s/ Max Kampelman
Attorney for Plaintiffs

/s/ Kitty Blair Frank
Assistant United States Attorney
Attorney for Defendant

[Filed November 16, 1956]

ANSWER TO SECOND AMENDED COMPLAINT FOR DECLARATORY JUDGMENT

First Defense

The complaint fails to state a claim upon which relief may be granted.

Second Defense

Answering the enumerated paragraphs of the amended complaint, defendant avers as follows:

1. Defendant is not required to answer the jurisdictional allegations of paragraph 1.

2. Denied. Defendant avers that Joseph Swartz is a native and citizen of Rumania.

3. and 4. Admitted.

5. Admitted. Defendant further avers that Joseph Swartz has lived in the United States ever since his admission for permanent residence at Sault Ste. Marie, Michigan, on August 3, 1908;that he was absent from the United States on a visit of about two days to Canada and that he re-entered the United States as a returning resident at Noyes, Minnesota during 1920 or 1921.

6. Admitted.

7. Admitted. Defendant further avers that the warrant charge upon which Joseph Swartz' deportation is ordered is based on a conviction in the District Court of the United States in and for the District of Minnesota on July 16, 1930 on his plea of guilty to the first count of a two-count indictment charging that on June 30, 1927 he did unlawfully sell, dispense, and give away a certain derivative of opium, to wit: morphine.

8. Admitted.

9. Defendant avers that the allegations of paragraph 9 are not material and that he is not required to answer. Defendant avers that Joseph Swartz is subject to deportation, however, under Section 241(a)(11) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1251(a)(11).

9. (a) Denied.

10. Denied.

WHEREFORE, having fully answered defendant demands judgment and costs of this action.

/s/ Oliver Gasch
United States Attorney

/s/ Kitty Blair Frank
Assistant United States Attomey

/s/ Edward P. Troxell, Principal
Assistant United States Attorney

/s/ Joseph M. F. Ryan, Jr.
Assistant United States Attorney

[Certificate of Service]

[Filed November 19, 1956]

AFFIDAVIT

STATE OF MINNESOTA)
COUNTY OF HENNEPIN) SS

Freda Swartz, being duly sworn, deposes and says that she is the lawful wife of Joseph Swartz, the Plaintiff in the above entitled action.

She entered the United States in 1925, and on November 3, 1925 went to Breckenridge, Minnesota. She was naturalized on June 13, 1939, in Minneapolis, Minnesota.

Her residences within the United States have been as follows:

1925 to 1929, Breckenridge, Minnesota.

1930 to 1933, Fargo, North Dakota.

1933 to present time, Minneapolis, Minnesota.

She has not travelled outside of the United States since her entry into the United States in 1925; has never visited Rumania; and has no knowledge of the Rumanian language. She has no criminal record of any kind.

She is a housewife; has no outside employment and depends solely and entirely upon her husband, the said Joseph Swartz, for her support and livelihood. She has an intense hatred for and entirely despises communism.

As a result of their marriage, affiant and the above-named Plaintiff have one living issue, a son Michael Charles Swartz.

Michael Charles Swartz was born on the 13th day of May, 1946, in Asbury Hospital, Minneapolis, Minnesota. At the time of his birth, the affiant and the said Joseph Swartz resided at 1900 Stevens Avenue South, Minneapolis, Minnesota.

The said Michael Charles Swartz has resided in Minneapolis, Minnesota since the date of his birth.

The said Michael Charles Swartz has attended Mrs. Slavin's Nursery School in Golden Valley, Minnesota for two years and has attented Kenwood Grade School, Minneapolis, Minnesota since kindergarten

up to and including the present time. He has never travelled outside of the United States. He can read and write the English language, but has no knowledge of any foreign language. The said Michael Charles Swartz is a minor and is enrolled in the fifth grade of the said Kenwood School, Minneapolis, Minnesota, and is fully and entirely dependent upon Joseph Swartz, for his support, livelihood and guidance.

/s/ Freda Swartz

[JURAT]

[Certificate of Service]

[Filed November 20, 1956]

ORDER

For good cause, it is this 20th day of November, 1956,

ORDERED by this Court that after hearing and upon consent of the parties, further hearing and decision in the instant case be postponed until after the determination of Catalanotte v. Butterfield, 236 F. 2d 955 (C. A. 6, 1956), sub nom, Mulcahey v. Catalanotte, 352 U. S. ___, 1956, by the United States Supreme Court.

/s/ Jas. W. Morris
Judge

/s/ Max M. Kampelman
Attorney for Plaintiffs

Of Counsel:

Robbie and Hoffman
827 Plymouth Building
Minneapolis 3, Minn.

[Filed July 15, 1957]

ORDER

This case having come on for hearing upon defendant's motion for judgment on the pleadings and plaintiffs' motion for summary judgment, and the Court having considered said motions, the oppositions

thereto, and oral argument of counsel, and it appearing to the Court upon the consent and acquiescence of the parties that the decision in the instant case with respect to plaintiffs' point number one is controlled in all respects by the Supreme Court's determination in Catalanotte v. Butterfield, 25 LW 4342, decided June 3, 1957, and it further appearing that with respect to plaintiffs' point number two, which alleges that deportation of plaintiff Joseph Swartz would violate the constitutional rights of plaintiff Freda Swartz and which counsel for plaintiffs concedes seeks relief only on behalf of plaintiff Freda Swartz, that there is no claim upon which relief can be granted, it is by the Court this 15th day of July 1957

ORDERED, that plaintiffs' motion for summary judgment be and the same is hereby denied, and the defendant's motion for judgment on the pleadings be and the same is hereby granted, and the complaint herein be and the same hereby is dismissed.

/s/ Richmond B. Keech
Judge

[Certificate of Service]

[Filed July 18, 1957]

NOTICE OF APPEAL

Notice is hereby given this 18th day of July, 1957, that the above-named plaintiffs hereby appeal to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 15th day of July 1957, in favor of the Defendant against said Plaintiffs.

/s/ Eugene Gressman
Attorney for Plaintiffs